ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-6871

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SUPREME COURT, U.S.

HOWARD L. GIFFORD,

Appellant

v.

ROBERT O. TIERNAN, CHAIRMAN
FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL FOR LACK OF JURISDICTION

On behalf of the appellee, 1/ the Federal Election Commission ("the Commission") moves to dismiss this appeal because this case is not within the appellate jurisdiction of this Court under 2 U.S.C. § 437h(b) 2/. Treating appellant's jurisdictional statement as a petition for writ of certiorari, the Court should deny the writ.

OPINIONS BELOW

The decision of the court of appeals is published at 670 F.2d 882 (9th Cir. 1982) and the decision of the district court is unpublished. Both of these decisions appear in the appendix to appellant's jurisdictional statement.

JURISDICTION

Appellant relies upon 2 U.S.C. § 437h as the basis for this Court's jurisdiction.

1/ Mr. Robert O. Tiernan is no longer a Commission member. Mr. Frank P. Reiche is currently Chairman of the Commission.

2/ This provision is § 310 of the Federal Election Campaign Act of 1971, (the "Act" or "FECA"), Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976), by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980).

STATUTES INVOLVED

The relevant statutory provision is 2 U.S.C. § 437h which states:

> (a) Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certifications of such questions to courts of appeals sitting en banc. The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
>
> (b) Appeal to Supreme Court; time for appeal. Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
>
> (c) Advancement on appellate docket and expedited disposition of certified questions. It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the dispositon of any matter certified under subsection (a) of this section.

STATEMENT OF THE CASE

This case is the sequel to an earlier action brought by the appellant, Howard L. Gifford. Proceeding in forma pauperis, Gifford filed a complaint in district court on April 6, 1978, which sought judicial review, pursuant to 2 U.S.C. § 437h, of the California Secretary of State's refusal to place his name on the June 1978 Congressional Primary ballot. In his complaint, Gifford alleged that he was "an uncertified candidate for the office of House of Representatives, 4th Congressional District" and contended that he qualified to have his name placed on the

primary ballot in California by satisfying the requirements of 2 U.S.C. § 431(b)(2).3/ On May 10, 1978, the district court dismissed Gifford's complaint as legally frivolous under 28 U.S.C. § 1915(d). The court found that Gifford's legal theory had no possibility of succeeding on the merits since it was clear that the FECA does not modify state ballot access requirements. Gifford v. California Secretary of State, Misc. No. S-78-30 (unpublished opinion of May 10, 1978).

On May 15, 1978, Gifford filed an amended complaint under § 437h, naming the United States Congress as defendant, challenging the constitutionality of § 431(b)(2). Essentially, Gifford contended in this complaint that Congress lacked the constitutional authority to regulate the campaigns of individuals defined as candidates under § 431(b)(2), but who have not qualified for the ballot. On June 6, 1978, the district court again dismissed Gifford's complaint as legally frivolous in light of the broad power of Congress under Article I, Section 4 of the Constitution to regulate congressional elections, and refused to certify the constitutional question to the en banc court of appeals under 2 U.S.C. § 437h. Gifford v. Congress, 452 F. Supp. 802 (E.D.Cal. 1978) ("Gifford I").

3/ Section 431(b)(2) provided that when used in the Act, the term "candidate" means:

> an individual who seeks nomination for election, or election, to Federal office whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, if he has -
> (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, to Federal office; or
> (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office.

This section was amended by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The current version is codified at 2 U.S.C. § 431(2).

Gifford appealed and, after further proceedings regarding justiciability,4/ a Ninth Circuit panel determined that no action was commenced against a proper party and dismissed the action by unpublished order of March 14, 1980.

Gifford commenced the present action against the Chairman of the FEC on March 19, 1980. In his complaint, Gifford once again challenged the constitutionality of § 431(b)(2) and sought certification of the constitutional question raised pursuant to § 437h. On April 16, 1980, a new district court judge dismissed Gifford's present action, noting that this complaint was "identical" to that filed in Gifford I, except that arguably a proper defendant had been named. The court found that Gifford's action remained legally frivolous and, therefore, still did not require certification to the court of appeals sitting en banc pursuant to 2 U.S.C. § 437h. Hence, the court dismissed the action for the reasons expressed in Gifford I. Gifford v. Tiernan, No. S-80-13 (unpublished order of April 16, 1980).

On appeal, a three judge panel of the Ninth Circuit affirmed the judgment of the district court. Gifford v. Tiernan, 670 F.2d 882 (9th Cir. 1982). The court held that "claims dismissed as frivolous pursuant to section 1915(d) need not be certified to the court of appeals for expedited en banc review and that the district court was correct in dismissing appellant's claim as legally frivolous." Id. at 883.

4/ The court of appeals remanded to the district court for consideration of whether the litigation presented a "judicable case or controversy" and, if so, whether the proper parties had been served. (order of July 31, 1979). The district court decided that the case was justiciable, and explained that no parties had been served because the court ruled the complaint frivolous and so declined to authorize service pursuant to 28 U.S.C. § 1915(d). The court then returned the case to the court of appeals. (memorandum opinion of Aug. 27, 1979).

ARGUMENT

By its terms, 2 U.S.C. § 437h(b) limits direct appeal to this Court to cases in which constitutional challenges to the Act have been certified, pursuant to 2 U.S.C. § 437h(a), by the district court to the court of appeals sitting en banc. Section 437h(b) does not, therefore, provide a jurisdictional basis for review of the instant case by this Court because the constitutional question presented has never been certified to, or decided by, the en banc court of appeals pursuant to § 437h(a). Gifford's claim was dismissed by the district court as legally frivolous. Hence, the decision below involved a normal appeal of a dismissal of a complaint decided by a panel of the court of appeals, and not a constitutional decision rendered by the en banc court of appeals under § 437h. Therefore, this Court should dismiss this appeal for lack of jurisdiction.

Treating Gifford's jurisdictional statement as a petition for writ of certiorari, this Court should deny the writ, for neither issue resolved by the court of appeals merits this Court's review. This Court has already determined, citing Gifford I, that 2 U.S.C. § 437h does not "require certification of constitutional claims that are frivolous." California Medical Association v. FEC, 453 U.S. 182, 193-194 n.14 (1981). The judges in the courts below have unanimously agreed that Gifford's claim that Congress lacks the power to regulate the campaign of an unofficial candidate is legally frivolous. Moreover, this Court has consistently recognized the broad power of Congress, under Article I, Section 4 of the Constitution, to enact legislation to regulate the conduct of federal elections.5/ Accordingly, since neither of the questions resolved in this case warrant review by this Court, the writ of certiorari should be denied.

5/ See, e.g., Buckley v. Valeo, 424 U.S. 1, 13 n.16 (1976); Burroughs v. United States, 290 U.S. 534, 545 (1934); Ex Parte Yarborough, 110 U.S. 651, 657-58 (1884).

CONCLUSION

For the foregoing reasons, the Commission submits that this Court should dismiss the instant appeal for lack of jurisdiction, and treating appellant's jurisdictional statement as a petition for certiorari, the Court should deny the writ.

Respectfully submitted,

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